PRIVY COUNCIL REPORTS

LEE CHOW MENG v. PUBLIC PROSECUTOR

[Privy Council (Lord Wilberforce, Lord Russell of Killowen, Lord Keith of Kinkel) May 10, 1979]

Criminal Law and Procedure — Petition for leave to appeal from decision of Federal Court — Privy Council — Jurisdiction — Courts of Judicature (Amendment) Act, 1976 (Act A 328), s. 13.

In this case the appellant was convicted by the Special President in Kuala Lumpur on April 19, 1975 and the court imposed consecutive sentences on him for various offences to which he pleaded guilty. He appealed against sentence to the High Court which dismissed his appeal on October 22, 1975. On January 23, 1976 reference on a question of law by the High Court to the Federal Court was abolished but a right of appeal from the High Court to the Federal Court conferred. On April 12, 1976, the High Court granted the defendant a certificate of reference on a question of law to the Federal Court. On September 8, 1976, the Federal Court refused to consider the reference but instead gave the appellant leave to appeal out of time. By a judgment dated April 8, 1978, the Federal Court struck out the appeal on the ground that at the time of his conviction the appellant had had no right of appeal to the Federal Court ([1978] 2 M.L.J. 36). The appellant applied for special leave to appeal in *forma pauperis* from the decision of the Federal Court.

Held: the effect of section 13 of the Courts of Judicature (Amendment) Act, 1976, is to exclude the right of appeal to the Yang di-Pertuan Agong in criminal matters and therefore the Privy Council has no jurisdiction to entertain the application.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Jagjit Singh for the appellant.

P. Medd, Q.C. for the respondent.

Lord Wilberforce (delivering the judgment of the Board): Their Lordships are of opinion that this petition must be dismissed. They consider that they have no jurisdiction to entertain it or to entertain an appeal. They consider that the effect of the amendment of section 74 of the Courts of Judicature Act, 1964, which is effected by section 13 of Act No. A328 of Malaysia, and in particular subsection (4) of that section 13, makes it perfectly clear that the amendment in question, which deletes the right of appeal in criminal matters, applies to all cases except those in which an appeal or an application for appeal is pending at the date of coming into force of the section, namely January 1, 1978. It is not possible to say on any view of the matter that there was pending on January 1, 1978, either an appeal or an application for appeal, and therefore their Lordships consider that the right of appeal in this criminal matter to the Yang di-Pertuan Agong is excluded. For this jurisdictional reason their Lordships are unable to entertain the petition.

Petition dismissed.

Solicitors: *Coward Chance; Stephenson Harwood*

T. DAMODARAN v. CHOE KUAN HIM

[P.C. (Lord Diplock, Lord Morris of Borth-y-Gest, Lord Edmund-Davies and Lord Fraser of Tulleybelton) April 3 and June 11, 1979]

[Privy Council Appeal No. 24 of 1977]

Legal Profession — Solicitor — Undertaking to pay balance of purchase moneys on registration of transfer of land — Lis pendens registered against land by third party — Effect of.

Land Law — Transfer of Land — Registration — Indefeasible title — Lis pendens — Effect of registration against land — National Land Code, ss. 215, 297, 340 & 417.

English Law — Reception of — Lis pendens — Civil Law Act, 1956, s. 6.

In this case the respondent as advocate and solicitor was acting for both the purchasers and the vendor of a piece of land. He gave an undertaking to confirm that the balance of the purchase money had been deposited with his firm and that this could be paid to the vendors upon the transfer of the land being registered. The transfer was duly registered but in the meantime a third person had obtained a *lis pendens* and this had been registered against the land. The respondent indicated that he would pay the money into court but the appellant, the vendor, applied for the payment of the money to him. The learned trial judge initially in Chambers ordered the payment of the money forthwith to the appellant but subsequently after further argument he ordered the money to be paid into court as deposit. The appellant appealed to the Federal Court which by a majority held that in the peculiar circumstances of the case the respondent should be allowed to pay the money into court and not to the appellant, the vendor — see [1976] 2 M.L.J. 207. The appellant appealed.

Held: (1) the terms of the solicitors' undertaking were clear, unqualified and unequivocal and there was no reason why the appellant should not recover the balance of the purchase price;

(2) even if the entry in the register of the order of *lis pendens* was lawful, it served no useful purpose at all and the purchaser in this case, had obtained the title to the land free from encumbrances;

(3) where by reason of a pending action in which the title to registered land is in dispute it would be just to suspend the registered proprietor's right to transfer the land pending the determination of the action, the proper and effective way of doing so is by entry of a private caveat.

Cases referred to:-

(1) *Damodaran* v. *Vesudevan* [1975] 2 M.L.J. 231.

(2) *Fels* v. *Knowles* (1906) 26 N.Z.L.R. 604, 620.

(3) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212.

(4) *Bellamy* v. *Sabine* (1857) 1 De G. & J. 566, 580.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

D.K. Ratee Q.C. (*C.W. Wong* with him) for the appellant.

Lim Kean Chye (*A. Jayadeva* with him) for the respondent.

Cur. Adv. Vult.

Lord Diplock (delivering the judgment of the Board): This, on the face of it, was a very simple case, well suited to be disposed of under the summary procedure which is available in Malaysia, as it is in England, for enforcing solicitors' undertakings. The undertaking which the appellant (herein referred to as "the vendor") seeks to have enforced was given by the respondent (herein referred to as "the solicitor") in connection with the sale of five parcels of land in Kedah to clients of the solicitor (herein referred to as "the purchaser"). The essential facts about the sale can be stated briefly.

The vendor was the registered proprietor of the land which was subject to a registered charge in the sum of $150,000. On August 2, 1973, he agreed to sell the land "free from all encumbrances whatsoever" to a Mr. Andawan who later, with the vendor's consent, assigned the benefit and burden of the contract to the purchaser. The price was $369,768 of which $36,976 was paid as a deposit, the balance being payable on completion which was stated to be on or before February 1, 1974.

On March 6, 1974, the solicitor gave to the vendor a written undertaking in the following terms:

"To M/s T. Damodaran s/o P. V. Raman,
No. 4211, Sungei Nyor Road,
Butterworth

Re: Sale of lands held under Grant Nos. 31020 for Lot 1003, 16830 for Lot 141, 16831 for Lot 142, 16832 for Lot 143, 16833 for Lot 144, all in the Mukim of *Sg. Pasir, District of Kuala Muda.*

This is to confirm that the sum of Ringgit Three hundred and thirty-two thousand, seven hundred and ninety two ($332,792) being the balance of the purchase price of the above-said lands has been deposited with us and that the said sum will be released to you upon the transfer of the said lands being duly registered in the name of the Purchaser Messrs. Syarikat Alor Merah Sdn. Bhd. or their nominee, nominees or assigns. Dated this 6th day of March, 1974."

Out of the monies referred to in this undertaking, the solicitor paid off the charge of $150,000, and on April 16, 1974, the vendor obtained the registration of the purchaser as registered proprietor of the land. On April 23, 1974, the solicitor sent to the vendor his firm's cheque for the balance of $182,200. On April 27, however, the cheque was stopped, and payment was not made.

The terms of the solicitor's undertaking are clear, unqualified and unequivocal. The event on the happening of which the money was to be paid took place on April 16, 1974, when the transfer of the lands was "duly registered in the name of the purchaser Messrs. Syarikat Alor Merah Sdn. Bhd." The failure to pay the balance of $182,200 is, on the face of it, a plain breach of the undertaking. There would seem to be no reason why in the instant proceedings, commenced on July 30, 1974, by originating summons against the solicitor to enforce the undertaking, the vendor should not recover judgment for the balance of $182,200 with interest from April 16, 1974.

Syed Agil Barakbah J., before whom the originating summons was heard, initially in chambers, did on December 7, 1974, order the solicitor to pay forthwith to the vendor the sum of $182,200 with interest at 12% per annum from April 16, 1974; but no order to this effect was then drawn up because the case was adjourned for further argument. As a result of further argument, instead of ordering payment to the vendor the learned judge, by order of July 14, 1975, ordered the solicitor to pay the money with interest thereon "into court as deposit".

On appeal to the Federal Court the judge's order for payment into court instead of to the vendor was upheld by a majority (Suffian L.P. and Wan Suleiman F.J.; Ali F.J. dissenting). The order was varied as respects the award of interest, but it is not necessary to go into this for the purpose of the instant appeal. Ali F.J. would have ordered payment of $182,200 direct to the vendor with interest at 6% from August 20, 1976, to date of payment.

What has complicated this comparatively simple case and led to the making of this most unusual order, is the existence of a concurrent suit relating to the same land, brought by a Mr. Vesudevan (herein referred to as "the claimant") against the vendor.

This concurrent litigation was preceded by attempts by the claimant to register a private caveat against the land claiming that he was entitled to an undivided half-share interest in it. On August 21, 1974, he obtained entry of a private caveat under section 324(2) of the National Land Code, but the vendor successfully applied to the High Court under section 327 for its removal. Apparently the claimant subsequently obtained entry of a second caveat despite the prohibition contained in section 329(2). This also was removed upon the vendor's application to the High Court and the claimant was restrained by injunction from entering any further caveats. Their Lordships do not know the grounds on which the caveats were removed.

On December 19, 1973, the claimant issued a writ against the vendor in the High Court in Malaya at Alor Star claiming an undivided half-share interest in the land; and on the following day he obtained *ex parte* an order of the court that the right in the disputed land was in question and that the order should remain in force as a *lis pendens* for twelve months or until the determination of the suit, whichever was the earlier. This *lis pendens* order was entered on the register document of title to the land on December 22, 1973. On February 9, 1974, the vendor applied to the High Court to have the *lis pendens* order set aside. His application was dismissed by the judge on April 27, 1974. It was as a result of this dismissal that the solicitor decided to stop the cheque for $182,200 in favour of the vendor.

The subsequent history of the *lis pendens* order is that the vendor's appeal to the Federal Court against the judge's refusal to set it aside was dismissed by that court on July 12, 1975: *Damodaran* v. *Vesudevan.*[1] No appeal to His Majesty the Yang di-Pertuan Agong has been brought from that decision of the Federal Court. So, as between the vendor and the claimant, the right of the latter to have the *lis pendens* order entered on the register document of title to the land is *res judicata;* but it is not *res judicata* as between the vendor and the solicitor or, what is more to the point in the instant appeal, between the claimant and the purchaser.

Nevertheless the fact remains that the *lis pendens* order was entered on the register on December 22, 1973, and was there at the time when the transfer of the ownership of the land from the vendor to the purchaser was registered. It has been renewed from time to time and remains so entered until the present day, since the suit by the claimant against the vendor has not yet been determined.

The solicitor knew of the entry on the register of the *lis pendens* order on March 6, 1974. Nevertheless

on that day he gave an unqualified undertaking to pay over the balance of the purchase price to the vendor upon the transfer of the land being duly registered in the name of the purchaser. He may well have thought that either the *lis pendens* order, which had been obtained *ex parte* and was unprecented in Malaysia in relation to land under the National Land Code, would be set aside when the application for that purpose came before the judge, or if it were not set aside, the transfer of the land to the purchaser would not be entered on the register. However this may be, he took the risk; the vendor was able to fulfil the condition; and their Lordships agree with the dissenting judgment of Ali F.J. that there was nothing to justify depriving the vendor of an order for payment directly to him of the sum due under the undertaking.

In making the order that he did for payment of the money into court the judge (Syed Agil Barakbah J.) did not found himself on the entry on the register of the *lis pendens* order. He believed this to be still under appeal to the Federal Court in the suit between the claimant and the vendor although in fact judgment upholding its validity had been given by the Federal Court two days before. He relied upon the existence of that suit itself as justifying his exercising his discretion to order payment of the money into court "in the interest of justice and in order to safeguard the interest of the plaintiff [sc. the claimant, Vesudevan] should he succeed in his claim".

The claimant was a stranger to the proceedings between the vendor and the solicitor. In their Lordships' view, the protection of the interests of the claimant was not a ground on which the judge could properly exercise a discretion to order payment into court in those proceedings instead of to the vendor.

In the Federal Court Suffian L.P. with whose judgment Wan Suleiman F.J. agreed, put the reasons for exercising a discretion to order payment of the money into court quite differently. He considered that the undertaking should be considered not in isolation but in the light of the sale agreement between the vendor and the purchaser under which the vendor had undertaken to give a title to the land free from all encumbrances. If the claimant's suit against the vendor were ultimately to succeed the Lord President was of the opinion that the purchaser would not have obtained an unencumbered title by his having been registered as proprietor of the land on April 16, 1974; and accordingly the purchaser would have a claim against the vendor under the contract of sale and probably one against the solicitor too. This, the Lord President considered, would not be fair to the solicitor.

The purchaser, like the claimant, was a stranger to the proceedings between the vendor and the solicitor; and their Lordships do not consider that the possibility of claims being made in the future by a stranger to the proceedings, even where those claims arise out of the transaction in relation to which the undertaking was given, is a matter which the court is entitled to take into consideration as a ground for ordering payment into court instead of to the vendor himself of money adjudged due to him by the solicitor. The main purpose and value of a solicitor's undertaking in transactions for the sale of land is that it is enforceable against the solicitor independently of any claims against one another by the parties to the contract of sale.

There is, however, a further reason for allowing the appeal with which their Lordships feel compelled to deal lest their failure to do so should allow the integrity of the Torrens System of registration of title to land in Malaysia to be undermined. The assumption underlying the decision of the majority in the Federal Court to order the money to be paid into court is that the purchaser on becoming registered as proprietor of the land on April 16, 1974, did *not* thereby obtain a title to the land free from encumbrances, which he continues to hold.

In their Lordships' opinion this assumption is incorrect. The National Land Code applies to Malaysia the Torrens System of registration of title to land. The whole purpose of the system is to get away from the complicated system of rules which in England regulate dealings with land, particularly those relating to such matters as notice of encumbrances and trusts. As was said by the Court of Appeal of New Zealand in relation to the corresponding New Zealand legislation, the Land Transfer Act, 1885:

> "The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorised by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest." *Fels* v. *Knowles.*[2]

In the National Land Code it is section 340 that expressly provides that the title of a person registered as proprietor of any land shall be indefeasible. The only exceptions are where there has been fraud, misrepresentation, forgery or an *ultra vires* acquisition purporting to have been made under statutory authority. None of these exceptions apply to the instant case. Interests in land, short of proprietorship, which are capable of being registered are leases, charges and easements. If registered they would amount to encumbrances within the meaning of a covenant against encumbrances; but unless registered they do not derogate from the unencumbered title of the registered proprietor of the land. Claims to be entitled to the proprietorship of land or a registrable interest in land, whether or not they are the subject of litigation, are not registrable as encumbrances on a registered title. Instead they are protected by the system of private caveats which, while leaving the registered title unqualified and intact, have the effect of preventing any dealing with it by the registered proprietor so long as the caveat remains in force; that is, until it is removed from the register. The way in which this system of protection operates was dealt with by their Lordships in the recent case of *Eng Mee Yong & Ors.* v. *V. Letchumanan,*[3] to which reference may conveniently be made.

This method of protecting claims to land and to registrable interests in land under the Torrens System is wholly inconsistent with the concept of *lis pendens* as it was developed as part of the land law of England.

Lis pendens in English law was originally based on the theory that so long as the title to property was being litigated in a court of justice parties to the litigation were incapable of alienating it because otherwise any judgment of the court might be frustrated: *Bellamy* v. *Sabine.*[4] A person to whom land was transferred while its title was the subject of dispute in a pending action obtained a defeasible title only. The doctrine did not originally depend on notice to the alienee nor was there any provision for registering a *lis pendens* until the Judgments Act, 1839. Thereafter a *lis pendens* did not bind a stranger unless either he had express notice or the *lis pendens* was registered. These provisions of the Judgments Act, 1839 were repealed by the Land Charges Act, 1925, which substituted similar provisions for the registration of pending actions; but neither the original common law doctrine of *lis pendens* nor the statutory modifications of it in England have any application to Malaysia. By section 6 of the Civil Law Ordinance, 1956,

"the law of England relating to the tenure or conveyance or assurance of or succession to any immoveable property or any estate, right or interest therein"

is expressly excluded from the general reception of English common law and rules of equity as part of the law of Malaysia.

The National Land Code makes no provision for the registration of a *lis pendens.* Counsel for the solicitor has drawn their Lordships' attention to section 417 of the National Land Code which provides that the court

"may by order direct the Registrar to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land and it shall be the duty of the Registrar to comply with the order forthwith."

But this, in their Lordships' view, does not authorise the court to direct the Registrar to make on the register entries of a kind for which no express provision is made by the National Land Code and which are inconsistent with the whole scheme of the Act; nor was section 417 relied on by the Federal Court in *Damodaran* v. *Vesudevan* (*ubi sup.*) as the source of power to order the registration of an order of *lis pendens.* The statutory source of power relied on by the Federal Court was section 25(2) and paragraph 6 of Schedule 1 to the Courts of Judicature Act, 1964, which vests in the High Court

"power to provide for the interim preservation of property the subject-matter of any cause or matter by sale or by injunction or the appointment of a receiver or the registration of a *caveat* or a *lis pendens* or in any other manner whatsoever."

In its judgment in *Damodaran* v. *Vesudevan* (*ubi sup.*) upholding the original order for registration of a *lis pendens* against the land at a time when the vendor, whose title was in dispute in that action, was still the registered proprietor, the Federal Court explicitly refrained from expressing any opinion as to what effect it would have upon the title of a subsequent purchaser of the land from the vendor.

In their Lordships' view the effect of the National Land Code is (1) that the registration of the *lis pendens* would not prevent the person registered as proprietor of the land (in the instant case, the vendor) from transferring the land to a transferee (in the instant case, the purchaser) and obtaining the registration of the transferee as registered proprietor in his stead; (2) that upon registration as proprietor the transferee would have an indefeasible title to the land against all the world, including the person in whose favour the order of *lis pendens* had been made; and (3) that the title of the transferee would be free from all encumbrances other than leases, charges and easements affecting the land and duly registered.

The functions of the Registrar in making the entries on the register for which the National Land Code provides are ministerial. Provided that the documents presented for registration are in the form provided for in the Code and executed by the proper party it is the duty of the Registrar under section 297 to register them and to make the appropriate memorial, entry or endorsement on the register document of title. In deciding whether an instrument of transfer is executed by the proper party the Registrar is bound by section 340 to treat the title of the registered proprietor to dispose of the land as indefeasible. In the instant case, accordingly, the Registrar had no power to refuse to register the transfer of the land from the vendor to the purchaser on April 16, 1974.

Once registered as proprietor of the land the title of the transferee in its turn becomes indefeasible under section 340. In saying this their Lordships have not overlooked the provision in section 215(3)(d) that the transferee shall hold the land subject to "all other matters then appearing on, or referred to in, the register document of title". The Code itself, however, contains no provision for any entry on the register document which would have the effect in law of making the title of a registered proprietor defeasible, and to construe the generality of the words in section 215(3)(d) as creating an exception to the express provision in section 340 that the title of the registered proprietor shall be indefeasible, would, in their Lordships' view, be inconsistent with the whole scheme of simplified land tenure and conveyancing for which the National Land Code was intended to provide.

It follows that, in their Lordships' view, the entry on the register of an order of *lis pendens* is a mere *brutum fulmen.* Even if it be lawful to make such an entry at all, it serves no useful purpose and their Lordships would suggest that the precedent set by *Damodaran* v. *Vesudevan* is one which ought not to be followed. Where by reason of a pending action in which the title to registered land is in dispute, it would be just to suspend the registered proprietor's right to transfer the land pending the determination of the action, the proper and effective way of doing so is by entry of a private caveat.

Their Lordships will accordingly advise His Majesty the Yang di-Pertuan Agong that this appeal should be allowed and that the respondent should be ordered to pay to the appellant the sum of $182,200 together with interest thereon at 6% per annum from April 16, 1974, and costs here and in the courts below.

Appeal allowed.

Solicitors: *Stephenson Harwood; Philip Conway Thomas & Co.*